5 Title to Real Property

In California, the basic principles now followed governing title to real property were derived from England's Common Law. In the absence of some specifically applicable constitutional or statutory provisions, the Common Law prevails.

CALIFORNIA ADOPTS A RECORDING SYSTEM

One of the first acts of the legislature of the new state was to adopt a recording system by which evidence of title or interest could be collected in a convenient and safe public place, so that those planning to purchase or otherwise deal with land might be presumed to be informed about the ownership and condition of the title. This system was designed to protect innocent lenders and purchasers against secret conveyances and liens and to allow the title to the real property to be freely transferable. The California Legislature adopted a recording system modeled after the system established by the original American Colonies. It was strictly an American device for safeguarding the ownership of land.

Actual v. Constructive Notice

Actual notice consists of express information of a fact. Constructive notice means notice given by the public records. By means of constructive notice, people are presumed to know the contents of recorded instruments.

Which Instruments May Be Recorded

The Recording Act of California provides that, after being acknowledged, any instrument or judgment affecting the title to or possession of real property may be recorded.

The word "instrument" as used in the Recording Act means "some paper signed and delivered by one person to another, transferring the title to, or giving a lien on, property or giving a right to a debt or duty." (Hoag v. Howard, Cal. 564.) "Instrument" does not necessarily include every writing purporting to affect real property. Instrument does include deeds, mortgages, leases, land contracts, deeds of trust and agreements between or among landowners.

Purpose of Recording Statutes

The general purpose of recording statutes is to permit (rather than require) the recordation of any instrument which affects the title to or possession of real property, and to penalize the person who fails to take advantage of recording. Because of recording, purchasers and others dealing with title to property may in good faith discover and rely upon the ownership as shown by the recorded instruments. While the Recording Act does not specify any particular time within which an instrument must be recorded, priority of recordation will ordinarily determine the rights of the parties if there are conflicting claims to the same parcel of land.

Instruments affecting real property must be recorded by the county recorder in the county within which the property is located. If the property lies in more than one county, the instrument, or certified copy of the record, must be recorded in each county in which the property is located in order to impart constructive notice in the respective counties.

If it is necessary to record a document written in a foreign language, the recorder will file the foreign language instrument with a certified translation. In those counties in which a photographic method of recording is employed, the foreign language instrument and the

translation may be recorded and the original instrument returned to the party seeking recordation.

When an Instrument is Deemed Recorded

Generally, an instrument is recorded when it is duly acknowledged or verified and deposited in the recorder's office with the proper officer and marked "filed for record." It is the duty of the recorder to number the instrument in the order in which it is deposited, include the year, month, day, hour and minute of its reception, and indicate at whose request it was "filed for record." The contents of the document are transferred to its appropriate book of records upon the page endorsed on the document, and the original document is returned to the party who left it for recording. The recorder indexes all recorded documents in alphabetical order according to the names of the grantors and grantees or mortgagors or mortgagees, and name or nature of the document. They are also indexed by date of recording and the recording reference.

Effect of Recording as Imparting Notice

The courts have ruled that the benefits of a recording statute are not available to one who takes title with *actual* notice of a previously executed though unrecorded instrument. For example, possession of land by one other than the seller is actual notice to an intending buyer sufficient to place a duty on the intending buyer to inquire about the possession. Despite the recording statutes and the assurance they give about the status of title, a prudent purchaser will always inspect the premises in person or through a trusted agent.

There are many types of unrecorded interests which a prospective purchaser may discover during a physical inspection of property. For example, a pathway or sewer line may mean adjoining owners have an unrecorded easement. Lumber or recent carpentry work may mean certain persons have a right to file mechanics' liens.

The recording laws do not protect the party "first to record" against the foregoing, nor do standard-form title insurance policies cover the situations described above.

Priorities in Recording

The California statute of priorities in recording encourages prompt recording of conveyances and prohibits use of the constructive notice doctrine as an aid to proven fraud. Only innocent parties are protected by the recording laws.

Not all liens on real property rank in priority according to their respective dates of recording. For example, with respect to the same parcel of property, A executed a mortgage in favor of B dated June 1 and recorded June 20. A executed a mortgage in favor of C dated June 10 and recorded June 15. C's mortgage will be superior in priority to B's only if C did *not* have, on or prior to June 15, notice of B's mortgage.

Special Lien Situations

The subject of liens and encumbrances is discussed later in detail but it will be helpful to note here the impact of the recording laws on this subject.

A lender will often agree to make "future advances" as a part of a secured loan transaction. Another lien (for example, a second deed of trust or mechanic's lien) may intervene between the time of recordation of the original lender's mortgage or deed of trust and the time of a future advance. A question of priority is then posed.

If the terms of the original loan transaction require the lender to make further advances (e.g., an installment payment under a construction loan), these "obligatory advances" have the same priority as the original deed of trust, regardless of intervening liens.

In other cases, the lender may have the privilege of advancing more money to the borrower but is not required to do so. This "optional advance" dates only from the time it is made unless the lender can show lender received no actual or constructive notice of intervening liens.

Mechanics' liens relate back to the time of the commencement of the construction work as a whole. Thus, a deed of trust must be executed, delivered, and recorded prior to commencement of any work at all in order to assure its priority.

Liens for real property taxes and other general taxes, as well as special county and municipal taxes and assessments are superior in priority to the lien of any mortgage or trust deed regardless of the date of execution or delivery or recording.

Provided they are bona fide encumbrances, trust deeds and mortgages recorded prior to general federal tax liens or state tax liens are superior in priority to those liens.

Persons having priority may by agreement waive this priority in favor of others. An agreement to do this is called a "subordination agreement." These agreements are often executed in connection with deeds of trust to subordinate a landowner's purchase-money deed of trust to a construction loan. Without such priority of claim for payment against the real property, the building contractor might refuse to expend time and materials on the project.

A mortgage or trust deed given for the purchase price of real property at the time of the conveyance has priority over all other liens created against the purchaser, subject to operation of the recording laws.

Two or more deeds of trust recorded at the same time (concurrently) may contain on the face of each deed of trust a recital about which deed of trust is intended by the parties to be first, second, third, etc. in priority. The recitals can be effective subordination agreements.

OWNERSHIP OF REAL PROPERTY

All property has an owner, either the government - federal, state or local — or some private party. Very broadly, an estate in real property may be owned in the following ways:

1. Separate ownership;
2. Concurrent ownership;
    a. Tenancy in common;
    b. Joint tenancy; and
    c. Community property.

SEPARATE OWNERSHIP

Separate ownership means ownership by one person. Being the sole owner, one person alone enjoys the benefits of property and is subject to the accompanying burdens, such as the payment of taxes. A sole owner is free to dispose of property at will, and normally only a sole owner's signature is required on the deed of conveyance.

CONCURRENT OWNERSHIP

Concurrent ownership or co-ownership means simultaneous ownership of a given piece of property by two or more persons. The several types of concurrent ownership are:

Tenancy in Common

Tenancy in common exists when two or more persons are owners of undivided interests in the title to real property. It is created if an instrument conveying an interest in real property to two or more persons does not specify that the interest is acquired by them in joint tenancy or in partnership or as community property.

Example: Interests of such tenants in common may be any fraction of the whole. One party may own one-tenth, another three-tenths, and a third party may own the remaining six-tenths. If the deed to cotenants does not recite their respective interests, the interests will be presumed to be equal.

There is a unity of possession in tenancy in common. This means each owner has a right to possession and none can exclude the others nor claim any specific portion for himself or herself alone. It follows that no tenant in common can be charged rent for the use of the land unless otherwise agreed to by all the cotenants. On the other hand a tenant in common who receives rent for the premises from a third party, must divide such profits with the other tenants in common in proportion to the shares owned. By the same token, payments made by one tenant in common for the benefit of all may normally be recovered on a proportionate basis from all. These might include moneys spent for necessary repairs, taxes, and interest and principal under a trust deed.

Any tenant in common is free to sell, convey or mortgage the tenant's own interest as he or she sees fit, and the new owner becomes a tenant in common with the others. Sometimes this may be impractical, and the tenant may force a sale of the entire property by filing an action in court known as a "partition action." As there is no right of survivorship, the undivided interest of a deceased tenant in common passes to his or her heirs or devisees who simply take the tenant's place among the owners of the property in common.

Joint Tenancy

Joint tenancy exists if two or more persons are joint and equal owners of the same undivided interest in real property. We regard this as a fourfold unity: interest, title, time, and possession. Joint tenants have one and the same interest, acquired by the same conveyance, commencing at the same time, and held by the same possession.

The most important characteristic of joint tenancy is the right of survivorship which flows from the unity of interest. If one joint tenant dies, the surviving joint tenant (or tenants) immediately becomes the sole owner. Thus, joint tenancy property cannot be disposed of by will nor does it become part of the estate of a joint tenant subject to probate. Further, the surviving joint tenant is not even liable to creditors of the deceased who hold unforeclosed liens on the joint tenancy property. The words "with the right of survivorship" are not necessary for a valid joint tenancy deed, although they are often inserted.

The creditors of a living joint tenant may proceed against the interest of that tenant and force an execution sale. This would sever the joint tenancy and leave title in the execution purchaser and the other joint tenant as tenants in common.

Exceptions. California appellate courts have accepted and enforced the common law rule that if any one of the four unities — time, title, interest or possession — is lacking, a tenancy in common, not a joint tenancy, exists. By statute, however, a joint tenancy may be created:

1. By transfer from a sole owner to himself or herself and others as joint tenants.

2. By transfer from tenants in common to themselves or to themselves, or any of them, and others as joint tenants.
3. By transfer from joint tenants to themselves, or any of them, and others as joint tenants.
4. By transfer from a husband and wife (when holding title as community property or otherwise) to themselves, or to themselves and others, or to one of them and to another or others as joint tenants.
5. By transfer to executors of an estate or trustees of a trust as joint tenants.

Severance. A joint tenant may sever the joint tenancy as to his or her own interest by a conveyance to a third party, or to a cotenant. If there are three or more joint tenants, the joint tenancy is severed as to the interest conveyed but continues as between the other joint tenants as to the remaining interests. If title is in A, B and C as joint tenants and A conveys to D, then B and C continue as joint tenants as to a two-thirds interest and D owns a one-third interest as tenant in common. If A and B only are joint tenants and B conveys to C, then A and C own as tenants in common. Also, partition may be had by joint tenants. If the partition cannot be made without prejudice to the owners, a court may order sale of the property and division of the proceeds.

In some circumstances, a severance will not terminate the right of survivorship interest of the other joint tenants in the severing joint tenant's interest. Nor, under the circumstances set out in Civil Code Section 683.2, may a severance contrary to a written agreement of the joint tenants defeat the rights of a purchaser or encumbrancer for value and in good faith and without knowledge of the written agreement.

On death of a joint tenant, the joint tenancy is automatically terminated. Nevertheless, for record title purposes, the following must be recorded in the county where the property is located:

- A certified copy of a court decree determining the fact of death and describing the property; OR
- A certified copy of the death certificate or equivalent, or court decree determining the fact of death, or letters testamentary or of administration or a court decree of distribution in probate proceedings. With each of these alternatives, it is customary to attach an affidavit which identifies the deceased as one of the joint tenants of the property.

The pros and cons of joint tenancy. On the plus side, the major advantage of joint tenancy is the comparative simplicity of vesting title in the surviving joint tenant (or joint tenants). The title delay of upward from six months involved in probate proceedings is avoided. Although certain legal costs are ultimately involved in formally terminating the joint tenancy, the customary commissions and fees payable to executors or administrators and to attorneys are avoided.

A further advantage of joint tenancy is that the survivor holds the property free from debts of the deceased tenant and from liens against the deceased tenant's interest. This can work an injustice to creditors, but a diligent creditor can usually take appropriate precautionary steps to avoid such loss, or may have access to other assets of the decedent.

On the other hand, in many situations joint tenancy is a pitfall for the ignorant or unwary.

The supposed advantages may be imaginary. A joint tenant may not want the other (surviving) joint tenant to get the title free and clear; the saving in probate fees is at least partly offset by costs of terminating the joint tenancy, and, indeed, may be completely offset by added taxes; the probate delay is not unreasonably long; and there may in fact be no creditors to worry about. Moreover, the joint tenant gives up the right to dispose of his or her interest by will.

Giving advice about the way to hold title to real property is ill-advised because tax and other consequences may result from holding title in one form or another.

Community Property

Community property basically consists of all property acquired by a husband and wife, or either, during a valid marriage, other than separate property. Separate property of either the husband or the wife is not community property.

Separate property of a married person includes:

1. All property owned before marriage.
2. All property acquired during marriage by gift or inheritance.
3. All rents, issues and profits of separate property, as well as other property acquired with the proceeds from sale of separate property. For instance, if a wife owned a duplex prior to marriage, the rents from the duplex would remain her separate property. If she sold the duplex and bought common stock, the stock and dividends would be her separate property. It would have to be clearly and unequivocally identifiable as separate property, and separate records should be maintained to make certain any separate property is not commingled with the community property in any way. Very often husband and wife deliberately or casually allow their separate property to merge with community property in keeping with their intentions.
4. Earnings and accumulations of a spouse while living separate and apart from the other spouse.
5. Earnings and accumulations of each party after a court decree of separate maintenance.
6. Property conveyed by either spouse to the other with the intent of making it the grantee's separate property.

It should be recalled that a husband and wife may hold property as joint tenants. Yet, even when title is held in joint tenancy, it is possible (e.g., by separate written agreement) to own the assets as community property. The record title may not be controlling in light of off-record agreements showing other intentions of the parties. Joint tenancy property owned by married persons may, in fact, be considered separate property.

Management and control. Each spouse has equal management and control of community property. An exception exists if one of the spouses manages a community personal property business. That spouse has sole management and control of that business. Community property is liable for the debts of either spouse contracted after marriage. Community property is liable for a debt contracted prior to marriage, except that portion of the community property comprised of the earnings of the other spouse.

Neither spouse may make a gift of community property without the consent of the other. Neither spouse may encumber the furniture, furnishings, or fittings of the home, or the clothing of the other spouse or minor children without the written consent of the other

spouse. Both must join in the conveyance, encumbrance or leasing of community real property.

If real property is owned by more than one person, licensees should obtain all necessary signatures to the contract at the time the owners sign the listing and acceptance.

Each spouse has the right to dispose of his or her half of community property by will. Absent a will, title to the decedent's half of the community property passes to the surviving spouse.

Joint tenancy and community property. Considerable confusion surrounds the status of some family homes in California since husband and wife may acquire their home with community funds but proceed to take record title "as joint tenants." It is not generally understood that some of the consequences of holding title in joint tenancy are entirely different from the consequences of holding title as community property.

The California courts are aware of this problem and have established the rule that the true intention of husband and wife as to the status of their property shall prevail over the record title. Ambiguity results from the specific circumstance of having the record title in joint tenancy while the true character of the property which husband and wife intended is community property. This transition might be accomplished by appropriate agreement in writing, or even by a deed from themselves as joint tenants to themselves "as community property."

Among themselves, the rights and duties of joint tenants are generally the same as among tenants in common, with the vital exception of the rule of survivorship. A joint tenant may borrow money and as security execute a mortgage or deed of trust on his/her interest just as a tenant in common may. This does not destroy the joint tenancy, but if the borrower should default, and the mortgage or deed of trust should be foreclosed while the borrower is still alive, the joint tenancy would be ended (severance) and a tenancy in common created. Most lenders would hesitate to make such a loan. If the borrower dies before the mortgage is paid off or foreclosed, the surviving joint tenant gets title free and clear of the mortgage executed by the deceased joint tenant.

TENANCY IN PARTNERSHIP

Tenancy in partnership exists if two or more persons, as partners, own property for partnership purposes. Under the Uniform Partnership Act, the incidents of tenancy in partnership are such that:

1. A partner has an equal right with all other partners to possession of specific partnership property for partnership purposes. Unless the other partners agree, however, no partner has a right to possession for any other purpose.

2. A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

3. A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership.

4. On death, a partner's right in specific partnership property vests in the surviving partner (or partners). The rights in the property of the last surviving partner would vest in the decedent's legal representative. In either case, the vesting creates a right to possess the partnership property only for partnership purposes.

5. A partner's right in specific partnership property is not subject to dower or curtesy (both have been abolished in California by statute) nor allowance to widows, heirs, or next of kin. Even when married, a partner's right is not community property. On the other hand, a partner's interest in the partnership as such (that is, a partner's share of profits and of surplus) is governed by community property rules for some purposes.

These incidents make sense because two or more persons are attempting to carry on a business for profit. Without these incidents, continuity and unified, efficient operation would be difficult. Partners are not, however, prevented from owning different fractional parts of the business. Thus, although each partner has unlimited liability to third parties for firm debts, each partner's interest in profits and losses may be any percentage agreed upon. Partners may also structure the business relationship as a partnership in many different ways. By agreement, one partner may have greater authority than the other partners.

ENCUMBRANCES

In this section, we examine the principal types of encumbrances which may be imposed on a given parcel of land without destroying the owner's estate.

Definition

An encumbrance may be defined very generally as any right or interest in land, possessed by a stranger to the title, which affects the value of the owner's estate but does not prevent the owner from enjoying and transferring the fee.

There are two categories of encumbrances: those affecting title and those affecting condition or use of property**.**

Encumbrances that affect title. Most notably, these are liens. A lien is defined as a charge imposed on property and made security for the performance of an act, typically the payment of a debt/promissory note. Liens may affect real or personal property and may be voluntary (e.g., a home mortgage to secure a loan) or involuntary (e.g., imposed by law for overdue taxes). A lien may be specific, affecting only a particular property (e.g., a trust deed, or a mechanic's lien on a given property) or general, affecting all property of the owner not exempt by law (e.g., a money judgment, or a lien for overdue state or federal income taxes).

Encumbrances that affect the physical condition or use of the property. These are easements, building restrictions and zoning requirements, and encroachments.

A buyer will commonly accept a deed to encumbered property, with the price adjusted accordingly. Often, the encumbrance is not objectionable; for example, an easement for utility wires. But sometimes a buyer may insist that the encumbrance be removed or cleared from the public record before the transaction closes.

Cloud on the title. A "cloud on the title" is defined as any outstanding claim or encumbrance which would, if valid, affect or impair the owner's title to a particular estate. While the cloud remains, the owner is prevented from conveying marketable title.

Examples are: a mortgage paid off but without official recordation of that fact; an apparent interest in the property which remains because one of a group of heirs fails to sign the deed on sale of the property; or a notice of action (a lis pendens) which remains on the public record even after plaintiff and defendant have agreed to dismissal of the court action. Removal of a cloud may require time and patience. Meanwhile, closing will

be postponed until the owner obtains a title insurance policy without reference to the cloud.

MECHANIC'S LIEN

California law expressly provides that persons furnishing labor or material for the improvement of real estate may file liens upon the property affected if the persons furnishing labor or material are not paid. Thus, an unpaid contractor, or a craftsman employed by the contractor to work on a building project but who has not been paid by the owner or contractor may protect their right, as an unpaid contractor or craftsman employed by a contractor, to get paid by filing a lien against the property in a manner prescribed by law. The same right is held by any person who has furnished material such as lumber, plumbing, or roofing if the claim is not paid. It is because of the possibility of these liens being recorded that an owner employing a contractor sometimes requires that a bond be furnished to guarantee payment of possible mechanics' lien claims.

Definition

A lien is a charge imposed in some way, other than by a transfer in trust upon specific property by which it is made security for the performance of an act. A mechanic's lien is a lien which secures payment to persons who have furnished material, performed labor, or expended skill in the improvement of real property belonging to another.

It is helpful to keep in mind while reading and thinking about this material on mechanics' liens that:

- The mechanic's lien claimant's fundamental objective is to get paid; and
- The claim of mechanic's lien is the claimant's security used to reach the objective of payment.

To convert the security for the lien into money requires:

1. Timely recordation of a notice and claim of lien (one document) in the county recorder's office in which the work of improvement is located;
2. Perfection of the recorded notice and claim of lien by the filing of an action (a lawsuit) in the right court ;
3. Recordation of a lis pendens;
4. Timely pursuit of the lawsuit to judgment; and
5. Enforcement of that judgment by a mechanic's lien foreclosure sale.

Origin. The basic lien rights of mechanics, materialmen, artisans and laborers is found at Article XIV, Section 3 of the State Constitution:

"Sec. 3. Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

The statutes enacted pursuant to this constitutional provision are in Title 15 Division 3, Part 4, of the Civil Code, commencing with Section 3082.

The theory. The mechanic's lien law is based on the theory that improvements to real property contribute additional value to land; therefore, it is only equitable to impose a charge on the land equal to such increase in value. This charge may exist in the absence of

any direct contract relationship between the lien claimant and the landowner. The lien must, however, be founded upon a valid contract with the contractor, subcontractor, lessee or vendee. Also, ordinarily the lien is valid only to the extent of labor and materials furnished for and actually used in the job.

Public policy. The mechanics' lien statutes and the decisions of the courts interpreting and construing them reflect a strong public policy of according extraordinary rights to unpaid contributors of services and material in the property they were instrumental in improving and in the funds intended for payment for the improvements. The rights of these unpaid contributors accrue and may be enforced against the property even though the owner of the property has not contracted with the claimant and has no personal liability to him.

The mechanic's lien device is the traditional remedy giving security to people who improve the property of others. However, owners are given means within the California statutes to protect against the burdening of their land with improper liens. The basic elements of California's system of protection for mechanics' lienors and owners are:

1. Mechanic's lien;
2. Stop notice on private work;
3. Stop notice on public work;
4. Payment bond on private work;
5. Payment bond on public work;
6. Contractor's license bond; and
7. Notice of nonresponsibility.

Persons Entitled to a Mechanic's Lien

The constitutional guarantee of the right to a mechanic's lien is accorded mechanics, artisans, and laborers. However, such lien rights have been extended by statute to all persons and laborers of every class performing labor upon, providing skill or other necessary services on furnishing materials, for, leasing equipment to be used upon, furnishing appliances, teams, or contributing power to a work of improvement. (Section 3110 of the Civil Code) Persons specifically entitled to mechanics' liens by virtue of the constitution and the statutes include the following:

- Mechanics
- Materialmen
- Contractors
- Subcontractors
- Lessors of Equipment
- Artisans
- Architects
- Registered Engineers
- Licensed Land Surveyors
- Machinists
- Builders
- Teamsters
- Draymen
- Union Trust Fund (Section 3111 Civil Code)

Property Subject to Mechanics' Liens

The property which may be subject to a claim of mechanic's lien should be considered to be that property described in a recorded claim of mechanic's lien. Perhaps the only safe exception to this is real property owned and used by the public. No lien for work or material attaches to a "public work." [*Los Angeles Stone Co. v. National Surety Co.*, 178 C 247, 173 P 79 (1918)] In situations in which private enterprise undertakes improvement of public lands, a claim of lien could be sustained against the improvement, although it

would be invalid as to the land. [Western Electric Co. Inc. v. Colley, 79 CA 770, 251 P 331 (1926)]

With every statutory increase in the designation of those contributors of services and material entitled to a claim of mechanic's lien, there has usually been a corresponding broadening of the property interests which may be subjected to a claim of mechanic's lien. Today, under appropriate circumstances, a claim of mechanic's lien may attach to only a building or structure; only to land beneath a building or structure; to both land and the building or structure; or, to a parcel of land upon which there is no structure.

Public works. This discussion of the mechanic's lien law applies only to private works of improvement. Sections 3179 through 3214 and Sections 3247 through 3252 of the Civil Code should be consulted in connection with any question or problem arising from the contribution of labor or material to a public work of improvement. A "public work of improvement" means any work of improvement contracted for by a public entity. "Public entity" means the state, Regents of the University of California, a county, a city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Work of Improvement

Mechanics' liens are triggered by the commencement of a work of improvement. A work of improvement is defined in Section 3106 of the Civil Code as including the construction, alteration, addition to, or repair of a building or structure. The structure could be a bridge, ditch, well, fence, etc. It may also include activities not directly associated with a building or structure such as seeding, sodding, planting, or grading.

Lender's Priority

If commencement of work has occurred on a project prior to recordation of a deed of trust, all mechanics' liens are prior to the recorded deed of trust. The lender's margin of security for repayment of a construction loan is jeopardized by the commencement of work on the project prior to recordation of the deed of trust. If any mechanic's lien claimant can show that commencement of work occurred prior to recordation of the lender's deed of trust, all mechanic's lienors will take priority over the lender if the project real property is sold at sheriff's sale. (Civil Code Section 3134)

Preliminary 20-Day Notice

The right to claim a lien and to assert the privileges of a mechanic's lien claimant is dependent on compliance with numerous statutory procedural requirements.

The initial step in the perfection of a claim of mechanic's lien for all claimants, except one under direct contract with the owner, one performing actual labor for wages or an express trust fund as defined in Civil Code Section 3111, is to give the preliminary 20-day notice specified in Section 3097 of the Civil Code. That is, before recording a mechanic's lien, the lien claimant gives a written notice to certain persons, depending on the relationship of the lien claimant to the work of improvement and the owner of the real property on which the work has been done or will be done. The notice may be given any time after the contract has been entered into, but it must be given no later than 20 days after claimant has first furnished labor, services, equipment or materials to the job site. The preliminary 20-day notice is preliminary to the recording of a mechanic's lien. It is a prerequisite to the validity of a claim of mechanic's lien. The persons who are entitled to *receive* the notice depends on the relationship of the mechanic's lien claimant to the owner of the property. Thus,

1. If the claimant has a direct contract with the owner, the notice needs to be given only to the construction lender, if any, or to the reputed construction lender, if any (Section 3097(b) of the Civil Code).
2. If the claimant does not have a direct contract with the owner, the notice is required to be given to the following (Section 3097 (a) of the Civil Code):
    a. The owner, or reputed owner;
    b. The original contractor, or reputed contractor; and
    c. The construction lender, or reputed construction lender.
    d. Any subcontractors with whom the claimant has contracted.

The purpose of the notice is to inform the owner, original contractor, and construction lender, prior to the time of recording a claim of lien, that the improved property may be subject to liens arising out of a contract to which they are parties. [Wand Corp. v. San Gabriel Valley Lumber Co. 236 CA2d 855, 46 Cal. Rptr. 486 (1965)]

The preliminary 20-day notice shall contain all of the following:

1. Name and address of the person furnishing the labor, service, equipment, or materials and an estimate of the total price thereof;
2. Name of the person who contracted for purchase of the labor, service, equipment, or materials;
3. Common street address of the job site, sufficient for identification; and
4. A general description of the labor, service, equipment, or materials furnished, or to be furnished.

An up-to-date form should be used since a failure to use a current form that complies with the statute may cause the court to disregard the preliminary 20-day notice. [Harold James Inc. v. Five Points Ranch, Inc., 158 CA3 1, 204 CR 494 (1984)]

Every written contract entered into between a property owner and an original contractor shall provide space for the owner to enter his name and address of residence and place of business. The original contractor must make available the name and address of residence of the owner to any person seeking to serve a preliminary 20-day notice. (Section 3097 (m) of the Civil Code)

If one or more construction loans are obtained after commencement of construction, the property owner must provide the name and address of the construction lender or construction lenders to each person who has given to the property owner a preliminary 20-day notice. (Section 3097 (n) of the Civil Code)

Filing preliminary 20-day notice [Civil Code Section 3097(o)]. Each person serving a preliminary 20-day notice may file (not record) that notice with the county recorder in which any portion of the real property is located. The filed preliminary 20-day notice is not a recordable document and, hence, is not entered into the county recorder's indices which impart constructive notice. Filing of the preliminary 20-day notice does not impart actual or constructive notice to any person of the existence (or contents) of the filed preliminary 20-day notice. No duty of inquiry on the part of any party to determine the existence or contents of the preliminary 20-day notice is imposed by the filing.

The purpose of filing the preliminary 20-day notice is limited. It is intended to help those who filed the preliminary 20-day notice get notice (from the county recorder by mail) of

recorded notices of completion and notices of cessation. Once the county recorder's office records either a notice of completion or cessation, it must mail to those persons who filed a preliminary 20-day notice, notification that a notice of completion or cessation has been recorded and the date of recording. (Section 3097 (o) (2) of the Civil Code)

Failure of the county recorder to mail the notification to the person who filed the preliminary 20-day notice or failure of those persons to receive notification shall not affect the period within which a claim of lien is required to be recorded.

The index maintained by the recorder of filed preliminary 20-day notices must be separate from those indices maintained by the county recorder of those official records of the county which by law impart constructive notice.

Determination of Completion Time

Fixing the time of completion, to the exact day, is critical to establishing whether or not a given claim of lien has been recorded within the time limit fixed by law. The determination of completion can be complex under California law. Generally, any one of the following alternatives is recognized by the law as equivalent to completion:

l. Occupation or use by the owner or owner's agent, accompanied by cessation of labor thereon;

2. Acceptance by the owner or owner's agent of the work of improvement;

3. A cessation of labor thereon for a continuous period of 60 days; or

4. A cessation of labor thereon for a continuous period of 30 days or more, if the owner records in the county recorder's office a prescribed notice of cessation (Section 3092, Civil Code).

If the work of improvement is subject to acceptance by any public entity, the completion date is considered as the date of acceptance or a cessation of labor for a continuous period of 30 days.

Thereafter the owner may file the notice of completion. If properly drawn, it will show the date of completion, the name and address of the owner, the nature of the interest or estate of the owner, a description of the property (which includes the official street address of the property if it has one), and the name of the original contractor, if any. If the notice is given only of completion of a contract for a particular portion of the total work of improvement, then the notice will also generally state the kind of work done or materials furnished. The notice of completion should be filed with the recorder of the county where the property is situated within 10 days after completion of the work of improvement.

A mechanic's lien may be filed:

1. By the *original contractor* within 60 days after the date of filing for record of the notice of completion. An original contractor is one who contracts directly with the owner or owner's agent to do the work and furnish materials for the entire job, or for a particular portion of the work of construction. Not uncommonly, the owner may enter into different original contracts, such as for plumbing, painting or papering. A material supplier, as such, is not an original contractor.
2. By *any claimant, other than the original contractor*, within 30 days after filing for record of the notice of completion.
3. If the notice of completion is not recorded, by *any claimant* within 90 days after completion of the work of improvement.

It should be noted that if there are two or more separate contracts and a notice of cessation or of completion is properly recorded as to one of them, the other contract cannot be tagged to it to extend the time in which the contractor thereunder may file a lien.

Termination of the Lien

Voluntary release of a mechanic's lien, normally after payment of the underlying debt, will terminate the lien. But even in the absence of release, the lien does not endure indefinitely. If a mechanic's lien claimant fails to commence an action to foreclose the claim of lien within 90 days after recording the claim of lien and if within that time no extended credit is recorded, the lien is automatically null, void and of no further force and effect. (Section 3144(b), Civil Code) When credit is extended for purposes of this limitation, it may not extend for more than one year from the time of completion of the work. Moreover, a notice of the fact and terms of the credit must be filed for record within the 90-day lien period.

If the lien is foreclosed by court action, there may ultimately be a judicial sale of the property and payment to the lienholder out of the proceeds.

Notice of Nonresponsibility

The owner or any person having or claiming any interest in the land may, within 10 days after obtaining knowledge of construction, alteration, or repair, give notice that he or she will not be responsible for the work by posting a notice in some conspicuous place on the property and recording a verified copy thereof. The notice must contain a description of the property; the name of the person giving notice and the nature of his/her title or interest; the name of the purchaser under the contract, if any, or lessee if known; and a statement that the person giving the notice will not be responsible for any claims arising from the work of improvement. If such notice is posted, the owner of the interest in the land may not have his/her interest liened, provided the notice is recorded within the ten-day period.

The validity of a notice of nonresponsibility cannot be determined from the official county records since they will not disclose whether compliance has been made with the code requirements as to posting on the premises. If such posting has not been made, a recorded notice affords no protection from a mechanic's lien.

Release of Lien Bond

Owners and contractors disputing the correctness or the validity of a recorded claim of mechanic's lien may record, either before or after the commencement of an action to enforce the claim of lien, a lien release bond in accordance with the provisions of Civil

Code Section 3143. A proper lien release bond, properly recorded, is effective to "lift" or release the claim of lien from the real property described in the lien release bond as well as any pending action brought to foreclose the claim of lien.

DESIGN PROFESSIONAL'S LIEN

Effective January 1,1991, California Civil Code Sections 3081.1 through 3081.9 provide for the filing of a design professional's lien.

For this purpose, a design professional is defined as a certificated architect, a registered professional engineer, or a licensed land surveyor.

If a landowner defaults under a contract with a design professional, the statutes provide that the design professional may mail to the landowner a statement of the default and a demand for payment. Subsequently, the design professional may record a notice of lien against the real property on which a work of improvement is planned to be constructed and to which the design professional supplied services pursuant to a written contract with the landowner.

The statutes provide for enforcement of a design professional's lien in the same manner as a mechanic's lien.

ATTACHMENTS AND JUDGMENTS

Property Subject to Attachment

Attachment is the process by which real or personal property of a defendant in a lawsuit is seized and retained in the custody of the law as security for satisfaction of the judgment the plaintiff hopes to obtain in the pending litigation. The plaintiff gets the lien before entry of judgment, and thus is somewhat more assured of availability of the defendant's property for eventual execution in satisfaction of the claim if judgment is indeed awarded to the plaintiff.

The purpose of an attachment is to protect a plaintiff who is a prospective judgment creditor against attempts by the defendant/debtor to transfer or dissipate the property subject to the attachment, and thus, in so dissipating the property, frustrate efforts to obtain satisfaction of a judgment subsequently obtained. The property seized and held under the attachment process constitutes an asset, or assets, which a judgment creditor may cause to be sold through execution proceedings in satisfaction of the judgment.

An attachment has always been referred to as a harsh remedy because it imposes a lien on the defendant's property and deprives him or her of absolute dominion and control over it for so long as it takes the court to adjudicate the plaintiff's claim. It is because of the deprivation of the defendant's right to dispose of defendant's attached property that the procedural framework of the attachment process has not been adopted to accommodate time consuming complex legal issues or disputes. Instead, the attachment process is based on the theory that the existence of a debt owed by the defendant to the plaintiff is conceded and that the principal function of the court is merely to ascertain the amount of that debt. This is why the right of a plaintiff to an attachment lien before trial has been historically confined to actions arising out of contracts, express or implied, for the payment of money.

Section 488.720 of the Code of Civil Procedure introduces a novel method of tempering the harsh consequences of an attachment lien and preventing its abuse. If, in noticed proceedings before the court, the value of the defendant's interest in the property sought to be attached can be shown to be clearly in excess of the amount necessary to satisfy

plaintiff's claim, the court may order a release of as much of the property as it considers excess security.

Prejudgment attachments of the property of a natural person (individual) have been limited by case law and statute to claims arising out of the conduct of a business, trade or profession. There are numerous other limitations on obtaining a prejudgment attachment.

Exempt from attachment and execution. As a matter of public policy, certain property is exempt from attachment or execution when proper claim is made for exemption. (Code of Civil Procedure Sections 487.020 and 706.010, et seq.)

The most important exemption is the homestead, and the formalities of declaration of homestead by the owner are discussed later in this chapter.

Judgment

A final judgment is the final determination of the rights of the parties in an action or proceeding by a court of competent jurisdiction. There is, of course, always a possibility that either party will appeal, and the judgment might subsequently be reversed or amended. Comparatively few judgments are appealed, but even for those which are not, the judgment is not truly finalized until the time to appeal or seek other procedural legal relief has elapsed.

A simple money judgment does not automatically create a lien. However, as soon as a properly certified abstract of the judgment is recorded with the recorder of any county, it becomes a lien upon all real property of the judgment debtor located in that county. It extends, moreover, to all real property the debtor may thereafter acquire, in that county, before the lien expires. The lien of a lump sum money judgment normally continues for ten years from the date of entry of the judgment or decree.

As with the lien on attachment, a judgment lien is discharged if enforcement of the judgment is stayed on appeal and the defendant executes a sufficient undertaking (promise or security) or deposits in court the requisite amount of money.

EASEMENTS

Generally

Having considered various types of liens which are encumbrances affecting the title to property, we now direct our attention to encumbrances which affect the physical condition or use of the property. Easements, probably the most common of this category, are ordinarily rights to enter and use another person's land or a portion thereof within definable limits. Therefore, an easement is a right, privilege or interest limited to a specific purpose which one party has in the land of another.

Easement rights are often created for the benefit of the owner of adjoining land. The benefitted land is called the "dominant tenement," and the land subject to the easement is described as the "servient tenement." Unless the easement is specifically described to be "exclusive," its creation does not prevent the owner of the land from using the land and the portion covered by the easement in a way which does not interfere with the use of the easement.

Appurtenant Easements

Typical statutory easements (or land burdens or servitudes as they are also known) include: a right of ingress and egress (a right to go on the land and to exit from the land); the right to use a wall as a party wall; the right to receive more than natural support from adjacent land or things affixed thereto. These easements, when attached to a ''dominant

tenement," are considered "appurtenant" thereto, and pass automatically upon transfer of the dominant tenement without explicit mention in the instrument of transfer. "Appurtenant" means "belonging to." Civil Code Section 801 lists a variety of easements. Civil Code Section 801.5 provides for a solar easement.

Easements in Gross

It is possible to have an easement which is not appurtenant to particular land. Thus A, who owns no land, may have a right-of-way over B's land. Public utilities frequently enjoy easements to erect poles and string wires over private lands, yet own no related dominant tenement. Such easements are technically known as easements in gross, and are personal rights attached to the person of the easement holder and not attached to any specific land, yet in reality they encumber someone's land and in effect constitute an interest therein.

If the instrument creating an easement is unclear, the following factors are useful in determining whether the easement is appurtenant or in gross: (1) if the easement can fairly be construed as being attached to the land it will be so construed; (2) the intention of the parties and the right created are important considerations; and (3) outside evidence may be considered.

How Easements Are Created

Easements may be created in various ways, such as by express grant, express reservation, implied grant or implied reservation, agreement, prescription, necessity, dedication, condemnation, sale of land with reference to a plat, or estoppel.

Normally, easements arise in one of three ways. Either they are expressly set forth in some writing (such as a deed or a contract) or they arise by implication of law or by virtue of long use. Those created by deed must comply with the usual requirements of any deed and may arise either by express grant to another or by express reservation to oneself.

While the most common method of creating an easement is by express grant or reservation in a grant deed, written agreements between adjoining landowners often are used. The only person who can grant a permanent easement is the fee owner of the servient tenement or a person with the power to dispose of the fee.

Easement by Implication of Law

Civil Code Section 1104 contains the rule for implied grants. Certain conditions must exist at the time a property is conveyed before an easement by implied grant will have effect. An easement by necessity is one example of an easement by implication, but an easement by necessity differs somewhat in its requirements from other easements by implication.

The "way of necessity" is generally recognized whenever a transfer occurs which truly "landlocks" a parcel of real estate and there is no method of access whatsoever, except over the servient tenement retained by the seller, or over the land of a stranger.

Another implied easement is recognized when land in one ownership is divided, and at the time of division one portion is being used for the benefit of the other portion, e.g., a sewer lateral.

Easement by Prescription

Continuous and uninterrupted use for five years will create an easement by prescription where such use is hostile and adverse (i.e., without license or permission from the owner), open and notorious (i.e., the owner knows of the use or may be presumed to have notice of the use), exclusive (i.e., although use is not necessarily by one person only, it is such as

to indicate to the landowner that a private right is being asserted), and under some claim of right. Also, if any ad valorem or other relevant real property taxes are assessed separately against the easement, these must be paid by the easement claimant.

Termination of Easements

Easements may be extinguished or terminated in several ways, including express release, legal proceedings, nonuse of a prescriptive easement for five years, abandonment, merger of the servient tenement and the easement in the same person, destruction of the servient tenement, and adverse possession by the owner of the servient tenement. An easement obtained by grant cannot be lost by nonuse.

RESTRICTIONS

A very common type of encumbrance is the restriction, which, as the name suggests, in some way restricts the free use of the land by the owner. Commonly, restrictions are referred to as the covenants, conditions, and restrictions (CC&Rs) or the declaration.

Restrictions are generally created by private owners, typically by appropriate clauses in deeds, or in agreements, or in general plans of entire subdivisions. A restriction usually assumes the form of a *covenant*—a promise to do or not to do a certain thing—or a *condition*. Zoning is an example of a public use restriction on the use of land.

Distinction Between Covenants and Conditions

A covenant is essentially a promise to do or not to do a certain thing. It is generally used in connection with instruments pertaining to real property, and is created by agreement. Typically it is embodied in deeds, but it may be found in any other writing. For example, a tenant might covenant in a lease to make certain repairs, or a buyer might covenant to use certain land only for a retail grocery store. A mere recital of fact, without anything more, is not a covenant.

A condition, on the other hand, is a qualification of an estate granted. Conditions, which can be imposed only in conveyances, are classified as conditions precedent and conditions subsequent. A condition precedent requires certain action or the happening of a specified event before the estate granted can vest (i.e., take effect).

A familiar example is a requirement found in most of the installment contracts of sale of real estate. All payments shall be made at the time specified before the buyer may demand transfer of title. If there is a condition subsequent in a deed, the title vests immediately in the grantee, but upon breach of the condition, the grantor has the power to terminate the estate. This is termed a forfeiture, since the title may revert or be forfeited to the creator of the condition without payment of any consideration.

Covenants and conditions are distinguishable in two further respects, in regard to the relief awarded and second, as to the persons by or against whom they may be enforced.

Relief awarded. As to the first, while a condition affects the estate created, and the failure to comply with it may result in a forfeiture of title, the only remedy to a breach of covenant is an action of damages or an injunction. Breach of a condition may prevent any right arising in favor of the breaching party, or destroy a right previously acquired, but does not subject the breaching party to liability and damages. Breach of covenant, while it gives rise to a right of actual damages, does not necessarily excuse the other party from performance.

Enforcement. As to the second difference, a covenant normally does not bind successors of the promisor who may become owners of the affected land. However, some covenants

"run with the land" (i.e., they bind the assigns of the covenantor or promisor and vest in and benefit the assigns of the covenantee or promisee), or they may be binding and effective by statute or in equity. Conditions, on the other hand, always run with the restricted land into the indefinite future.

How construed. Whether a particular provision is a condition or covenant is a question of construction. Since the law abhors forfeitures, the courts ordinarily will construe restrictive provisions as covenants only, unless the intent to create a condition is plain. The use of the term "condition" or "covenant" is not always controlling. The real test is whether the intention is clearly expressed and the enjoyment of the estate conveyed was intended to depend upon the performance of a condition; otherwise, the provision will be construed as a covenant only.

For instance, the deed reciting that it is given upon the agreement of the grantee to do or not to do a certain thing implies a covenant and not a condition. So also with a recital that the land conveyed is or is not to be used for certain purposes.

Certain Covenants and Conditions Are Void

Covenants and conditions that are unlawful, impossible of performance, or in restraint of alienation are void.

A condition that a party shall not marry is void, but a condition to give use of property only *until* marriage is valid. A condition against conveying without the consent of the grantor, or for only a specified price, is void as in restraint of alienation. In such cases, title passes free of the condition subsequent. Title does not pass at all if a condition precedent is impossible to perform or requires the performance of a wrongful act. However, if the act itself is not wrong, but is otherwise unlawful, the deed takes effect and the condition is void.

Covenants Implied in Grant Deed

When the word "grant" is used in any conveyance of an estate of inheritance or fee simple, it implies the following covenants on the part of the grantor (and grantor's heirs or successors in interest) to the grantee (and grantee's heirs, successors and assigns):

1. That the grantor has not already conveyed the same estate or any interest therein to any other person;
2. That the estate is free from undisclosed encumbrances made by the grantor, or any person claiming under grantor. As noted earlier, encumbrances include liens, taxes, easements, restrictions, conditions.

Thus, a grant deed by a private party is presumed by law to convey a fee simple title unless it appears from the wording of the deed itself that a lesser estate was intended. Moreover, if a grantor subsequently acquires any title or claim of title to the real property which grantor had purported to grant in fee simple, that after-acquired title usually passes by operation of law to the grantee or grantee's successors.

Deed Restrictions

Restrictions imposed by deeds, or in similar private contracts, may be drafted to restrict, for any legitimate purpose, the use or occupancy of land. The right to acquire and possess property includes the right to dispose of it or any part of it, and to impose upon the grant any legal restrictions the grantor deems appropriate. However, the right may not be exercised in a manner forbidden by law. Restrictions prohibiting the use of property on the basis of race, color, sex, religion, ancestry, national origin, age (generally), disability, sexual orientation, marital status, familial status, or source of income are unenforceable

under state and federal law. In addition, conditions considered unreasonable or "repugnant to the interest created" are prohibited by Section 711 of the Civil Code.

Restrictions may validly cover a multitude of matters: use for residential or business purposes; character of buildings (single family or multiple units); cost of buildings (e.g., a requirement that houses cost more than $100,000); location of buildings (e.g., side lines of five feet and 20-foot setbacks); and even requirements for architectural approval of proposed homes by a local group established for that purpose.

Unless the language used in the deed clearly indicates that the grantor intended the conditions or restrictions to operate for the benefit of other lots or persons, the restrictions run to the grantor only, and a quitclaim deed from the grantor, or grantor's heirs or assigns, is a sufficient release. However, if the language used in the deed shows that the conditions or restrictions were intended for the benefit of adjoining owners, or other lots or owners in the tract, quitclaim deeds must be obtained from all owners of lots having the benefit thereof, as well as from the grantor or grantor's heirs or assigns, in order to release them.

Notice of Discriminatory Restrictions

Effective January, 2000, a county recorder, title insurance company, escrow company, or real estate licensee who provides a declaration, governing documents or deed to any person must provide a specified statement about the illegality of discriminatory restrictions and the right of homeowners to have such language removed. The statement must be contained in either a cover page placed over the document or a stamp on the first page of the document.

New Subdivisions

In contrast to zoning ordinances, private contract restrictions need not promote public health, general public welfare or safety. They may be intended to create a particular type of neighborhood deemed desirable by the tract owner and may be based solely on aesthetic conditions. As might be expected, the most common use of restrictions today is in new subdivisions. The original subdivider establishes uniform regulations as to occupancy, use, character, cost and location of buildings and records a "declaration of restrictions" when the subdivision is first created. Thereafter, all lot owners, as among themselves, may enforce the restriction against any one or all of the others, provided the restrictions have been properly imposed.

In some cases, when land is originally subdivided, arrangement is made in the nature of a covenant whereby a perpetual property owners' association is formed, to be governed by rules and regulations set forth in an agreement signed by all new lot purchasers. Such associations are often given the power to amend tract restrictions from time to time to correspond with community growth. They may have the power to revise building restrictions pertaining to certain blocks of lots in the development, impose architectural restrictions and make other authorized requirements from time to time.

Termination

Restrictions may be terminated by

1. expiration of their terms;
2. voluntary cancellation;
3. merger of ownership;
4. act of government; or

5. changed conditions (i.e., a court finds that the restrictions should be terminated because the conditions which the restrictions addressed have changed).

Restrictions usually have either a fixed termination date or one which becomes effective on recordation of a cancellation notice by a given percentage of the lot owners.

Zoning Regulations

Restrictions on the use of land may be imposed by government regulation as well as by private contracts.

The governing authority of a city or county has the power to adopt ordinances establishing zones within which structures must conform to specified standards as to character (including aesthetic considerations) and location, and to prohibit buildings designed for business or trade in designated areas. However, zoning restrictions, to be valid, should be substantially related to the preservation or protection of public health, safety, morals or general welfare. They must be uniform and cannot be discriminatory or created for the benefit of any particular group. Public authorities may enjoin or abate improvements or alterations which are in violation of a zoning ordinance, but only the use of the land, not the title, is affected.

ENCROACHMENTS

Adjoining owners of real property often find themselves involved with real estate law because of *encroachments* in the form of fences or walls and buildings extending over the boundary line. The party encroaching on a neighbor may be doing so with legal justification. The person who encroached may have gained title to the strip encroached on by adverse possession, or may have acquired an easement by prescription or possibly by implication.

On the other hand, the encroachment may be wrongful. If it is, the party encroached upon may sue for damages and a court may require removal of the encroachment.

Note: If the encroachment is slight (e.g., measurable in inches), the cost of removal great, and the cause an excusable mistake, a court may deny removal and award dollar damages.

HOMESTEAD EXEMPTION

The principal purpose of the *homestead exemption* is to shield the home against creditors of certain types whose claims might be exercised through judgment lien enforcement. Few areas of California real property law are more misunderstood by lay persons.

Obligations unaffected by the declaration. Over the years the homestead exemption amount has been increased from time to time, with the type of homestead determining the actual amount of the exemption. However, the validity of a homestead depends not only upon the recordation of the homestead declaration but on certain off-record matters as well, e.g., actual residency in the declared homestead dwelling at the time the declaration is recorded and an actual interest in the “dwelling.”

The homestead declaration does not protect the homestead from all forced sales; e.g., it is subject to forced sale if a judgment is obtained: (l) prior to the recording of the homestead declaration; (2) on debts secured by encumbrances on the premises executed by the owner before the declaration was filed for record; and (3) obligations secured by mechanics’, contractors’, subcontractors’, laborers’, materialmen’s or vendors’ liens on the premises. Voluntary encumbrances by the owner of the homestead are not affected by a declaration of homestead. A mortgage or deed of trust is an example of a voluntary encumbrance.

Two Homestead Statutes

Articles 4 and 5 of Chapter 4, Division 2, Title 9, Part 2 of the California Code of Civil Procedure (Sections 704.710-704.995) contain, respectively, the residential homestead exemption and the declared homestead

While both articles deal with granting homeowners homestead protection from the claims of certain creditors, the articles seem to be mutually exclusive. Article 4 provides protection to homeowner debtors who meet the requirements but have not filed a declaration of homestead. Article 5 concerns homeowners who undertake the actual filing of a homestead declaration. In either case, there is protection against certain judgment liens to the amount of the exemption afforded by law.

The following discussion concerns primarily the declared homestead under Article 5.

(**NOTE:** A probate homestead also exists in California. See Probate Code Sections 60 and 6520 through 6528.)

Declared Homestead

A dwelling in which an owner or his or her spouse resides may be selected as a declared homestead by recording a homestead declaration in the office of the county recorder of the county where the dwelling is located. From and after the time of recording, the dwelling is a declared homestead.

Definitions for Declared Homestead

A "declared homestead" is the dwelling described in a homestead declaration and a "declared homestead owner" includes both (1) the owner of an interest in the declared homestead who is named as a declared homestead owner in a homestead declaration recorded pursuant to Article 5 and (2) the declarant named in a declaration of homestead recorded prior to July 1, 1983 pursuant to former law (Civil Code) and the spouse of such declarant.

"Dwelling" means any interest in real property (whether present or future, vested or contingent, legal or equitable) that is a "dwelling" as defined in Section 704.710 of Article 4 of this code, but does not include a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust.

''Homestead declaration" includes both (l) a homestead declaration recorded pursuant to Article 5 and (2) a declaration of homestead recorded prior to July 1,1983, pursuant to former (Civil Code) law.

"Spouse" means a "spouse" as defined in Section 704.710 of Article 4.

Definitions and Terminology from Article 4

Some of the terminology for declared homesteads depend for their meaning on definitions from Article 4, which covers a residential exemption if there is no filing of a homestead declaration document. The definitions are:

1. **"Dwelling"** means a place where a person actually resides and may include but is not limited to the following:

    a. A house together with the outbuildings and the land upon which they are situated;

    b. A mobilehome together with the outbuildings and the land upon which they are situated;

    c. A boat or other waterborne vessel;

d. A condominium, as defined in Section 783 of the Civil Code;

e. A Planned Development, as defined in Section 11003 of the Business and Professions Code;

f. A stock cooperative, as defined in Section 11003.2 of the Business and Professions Code; and

g. A community apartment project, as defined in Section 11004 of the Business and Professions Code.

2. **"Family unit"** means any of the following:

   a. The judgment debtor and the judgment debtor's spouse if the spouses reside together in the homestead.

   b. The judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead:

      (1) The minor child or minor grandchild of the judgment debtor or the judgment debtor's spouse or the minor child or grandchild of a deceased spouse or former spouse.

      (2) The minor brother or sister of the judgment debtor or judgment debtor's spouse or the minor child of a deceased brother or sister of either spouse.

      (3) The father, mother, grandfather, or grandmother of the judgment debtor or the judgment debtor's spouse or the father, mother, grandfather, or grandmother of a deceased spouse.

      (4) An unmarried relative described in this paragraph who has attained the age of majority and is unable to take care of or support himself or herself.

   c. The judgment debtor's spouse and at least one of the persons listed in paragraph (2) who the judgment debtor's spouse cares for or maintains in the homestead.

3. **"Homestead"** means the principal dwelling (l) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead. Where exempt proceeds from the sale or damage or destruction of a homestead are used toward the acquisition of a dwelling within the six-month period provided by Section 704.720, "homestead" also means the dwelling so acquired if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse resided continuously from the date of acquisition until the date of the court determination that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired.

4. **"Spouse"** does *not* include a married person following entry of a judgment decreeing legal separation of the parties, or an interlocutory judgment of dissolution of the marriage, unless such married persons reside together in the same dwelling.

Amount of Homestead Exemption

The amount of the homestead exemption is the same under Articles 4 and 5 and is based upon the debtor's status at the time the creditor's lien is recorded. The current protected homestead exemption value and the protected homestead exemption values for several years past are as follows:

When Recorded *On and after*	Head of Family	Others	Persons 65 and Older *See a, b, c and d below*
January 1, 1985.....	$45,000	$30,000	
Jan. 1, 1981 to Dec. 31, 1984	45,000	30,000	$45,000
Jan. 1, 1979 to Dec. 31, 1980	40,000	25,000	40,000
Jan. 1, 1977 to Dec. 31, 1978	30,000	15,000	30,000
Jan. 1, 1971 to Dec. 31, 1976	20,000	10,000	20,000
Nov. 10, 1969 to Dec. 31, 1970	15,000	7,500	15,000

Creditors having a right to execute on a homestead cannot be prejudiced by subsequent increases in the statutory exemption value. The statutory definition of the protected value is the actual cash value of the dwelling over and above all liens and encumbrances on it at the time of levy of execution. In other words, the homestead protects the owner's equity in the dwelling.

a. Amendment effective January 1, 1985

California Code of Civil Procedure Section 704.730 was amended effective January 1, 1985 to provide that the homestead exemption shall be $55,000 if the judgment debtor or spouse of judgment debtor residing on the homestead is 65 years of age or older, or physically or mentally disabled and unable to engage in substantial gainful employment. The amendment makes it clear that the exemption amount is a combined exemption amount if both spouses are jointly obligated under the judgment.

Creditors are interested in knowing the dollar amount of the owner's protected equity in homestead property because it determines whether or not they can enforce their claim against it. In cases where the owner's protected equity in homestead property exceeds the statutory exemption limit, it becomes of significance in the reporting and insuring of titles to real property protected by a homestead.

b. Amendment effective January 1,1987:

Code of Civil Procedure Section 704.730 was amended effective January 1, 1987 raising the homestead exemption to $60,000 if the judgment debtor is either 65 years of age or older or a person physically or mentally disabled (and as a result unable to engage in substantial gainful employment).

c. Amendment effective January 1, 1989:

1. Code of Civil Procedure Section 704.730 was amended effective January 1, 1989, raising the homestead exemption to $75,000 if judgment debtor is either 65 years of age or older or a person physically or mentally disabled and as a result of that disability unable to engage in substantial gainful employment.

2. The amendment effective January 1, 1989 also permitted a homestead exemption of $75,000 if the judgment debtor is a person 55 years of age (or older); has a gross income of not more than $15,000 (or if the judgment debtor is married, a

gross annual income, including the gross annual income of the debtor's spouse, of not more than $20,000); and sale is an involuntary one.

d. Amendment effective January 1, 1991:
Effective January 1, 1991, the three categories of homestead exemptions in Code of Civil Procedure Section 704.730 were changed in the amount of the exemption only. The new amounts are:

1. From $30,000 to $50,000 (704.730 (a)(1))
2. From $45,000 to $75,000 (704.730 (a)(2))
3. From $75,000 to $100,000 (704.730 (a)(3))

Again, in reliance on any of the above statutes, creditors having a right to execute on a homestead cannot be prejudiced by subsequent increases in the statutory exemption value.

e. Amendments effective January 1, 1998

1. Code of Civil Procedure Section 704.730(a)(3) has been amended effective January 1, 1998. By amendment, the homestead exemption is raised to $125,000 if judgement debtor is either:
   - 65 years of age or older, or
   - Physically or mentally disabled and unable to engage in substantial gainful employment.
2. Code of Civil Procedure Section 704.730(a)(3) has been amended effective January 1, 1998. By amendment, the homestead exemption is raised to $125,000 if the judgment debtor is:
   - a person 55 years of age or older,
   - with a gross income of not more than $15,000 (or if the judgement debtor is married, a gross annual income, including the gross annual income of the debtor's spouse, of not more than $20,000), and
   - the sale is an involuntary one.
3. C.C.P. 704.730(a)(1) is now $50,000
4. C.C.P. 704.730(a)(2) is now $75,000

Contents of the Declaration of Homestead

1. A recorded homestead declaration will contain all of the following:
   a. The name of the declared homestead owner. A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead.
   b. A description of the declared homestead.
   c. A statement that the declared homestead is the principal dwelling of the declared homestead owner or such person's spouse, and that the declared homestead owner or such person's spouse resides in the declared homestead on the date the homestead declaration is recorded.

2. The homestead declaration shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by at least one of the following persons.

   a. The declared homestead owner.

   b. The spouse of the declared homestead owner.

   c. The guardian or conservator of the person or estate of either of the persons listed in Paragraph (1) or (2). The guardian or conservator may execute, acknowledge, and record a homestead declaration without the need to obtain court authorization.

   d. A person acting under a power of attorney or otherwise authorized to act on behalf of a person listed in paragraph (l) or (2).

3. The homestead declaration shall include a statement that the facts stated in the homestead declaration are known to be true as of the personal knowledge of the person executing and acknowledging the homestead declaration. If the homestead declaration is executed and acknowledged by a person listed in paragraph (3) or (4) of subdivision (b), it shall also contain a statement that the person has authority to so act on behalf of the declared homestead owner or the spouse of the declared homestead owner and the source of the person's authority.

The definition of "dwelling" for purposes of Article 5 means an interest in real property that is a dwelling as defined in Section 704.710 but excludes a leasehold estate with an unexpired term of less than two years at the time of the filing of the homestead declaration. Thus a "dwelling" that is personal property (boat, waterborne vessel or mobilehome not affixed to land) appears to be excluded under Article 5.

The law does not set a limit on the amount of land that may be contained in the homestead "dwelling" property, ownership interest and occupancy by the owner or owner's spouse at the time of filing the declaration being the principal governing factors.

Where unmarried persons hold interests in the same "dwelling" in which they both reside, they must record separate homestead declarations if each desires to have a valid homestead.

Under previous law, a person who was a "head of household" was entitled to qualify for the amount of the greater exemption. Under current law, the amount of the exemption will depend upon whether or not the judgment debtor qualifies as a "family unit."

Declarations recorded prior to July 1, 1983. Any declaration of homestead filed prior to July 1,1983, remains valid, but the effect is limited to the effect given a homestead declaration under current statutes, i.e., the previously filed declaration must be qualified under present law.

Effect of recording - how terminated. When a valid declaration of homestead has been filed in the office of the county recorder where the property is located, containing all of the statements and information required by law, the property becomes a homestead protected from execution and forced sale, except as otherwise provided by statute, and it remains so until terminated by conveyance, abandoned by a recorded instrument of abandonment, or sold at execution sale.

A homestead declaration does not restrict or limit any right to convey or encumber the declared homestead.

To be effective, the declaration must be recorded; when properly recorded, the declaration is prima facie evidence of the facts contained therein; but off-record matters could prove otherwise.

Rights of spouses. A married person who is not the owner of an interest in the dwelling may execute, acknowledge, and record a homestead declaration naming the other spouse who is an owner of an interest in the dwelling as the declared homestead owner but at least one of the spouses must reside in the dwelling as his or her principal dwelling (Sections 704.920 and 704.930(a) (3) and (b) (2)), at the time of recording.

Either spouse can declare a homestead on the community or quasi-community property, or on property held as tenants in common or joint tenants, but cannot declare a homestead on the separate property of the other spouse in which the declarant has no ownership interest. A homestead cannot be declared after the homeowner files a petition in bankruptcy. (Note: "Quasi-community property" refers to real property situated in this state acquired in any of the following ways: (1) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition. (2) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.)

If a husband and wife own separate interests as separate property, each spouse qualifies for his or her own exemption but the combined exemptions cannot exceed the amount that is due to a "family unit." A declaration intended to be for the "joint benefit" of both spouses, one or both spouses must qualify as a "family unit."

After a decree of legal separation or interlocutory judgment of dissolution of marriage, if a spouse no longer resides on the property, the spouse cannot declare a homestead on the property.

Levy and execution sale. When an execution for the enforcement of a judgment is levied on a homestead dwelling, the judgment creditor must follow specific procedures.

Within 20 days after a writ of execution is levied and the creditor is notified of this fact, the creditor must apply to the court where the judgment was rendered for an order to execute the sale of the property (Section 704.760).

The value of the property is determined by the court. The court may appoint an appraiser and will consider other evidences of value in order to set a minimum bid for the property. Creditors must prove sufficient value to receive the minimum bid or the court may not make a finding for the sale.

If the court makes an order for sale of the dwelling upon a hearing at which neither the judgment debtor's spouse nor attorney debtor or spouse appeared, then within 10 days after the order for sale, the creditor must serve a copy of the order and statutory notice of sale on the debtor. The property is not sold if no bid is received at least equal to the court's prescribed minimum bid (which is a sum at least equal to the amount needed to pay all liens and encumbrances on the property, the amount of the homestead exemption, and the lien of the judgment creditor enforcing the lien), and the creditor cannot subject the property to an additional order for sale for at least one year (Section 704.800).

After the sale, the proceeds of sale are distributed as follows: (a) to discharge all liens and encumbrances on the property recorded prior to the judgment lien; (b) to the owner/debtor

for the amount of the homestead exemption; (c) to costs of execution; (d) to the amount due the judgment creditor; and finally (e) balance to owner/debtor.

The proceeds from the execution sale are exempt for 6 months after the debtor receives the proceeds. If reinvested in a new "dwelling" and a new declaration of homestead is recorded within this 6 month period, the new filing has the same effect as though recorded on the date the prior declaration was recorded. (Section 704.960(b))

Federal Homestead Act of 1862

The declared homestead discussed above has nothing to do with the term "homesteading" as applied to filings on federal lands whereby a person acquired title to acreage by establishing residence or making improvements upon the land.

The purpose of the Federal Homestead Act of 1862 was to encourage settlement of the nation. Except for Alaska, homesteading was discontinued on public lands in 1976 when, because all the good agricultural land had already been homesteaded/deeded, Congress recognized that the Homestead Act had outlived its usefulness and passed the Federal Land Policy and Management Act of 1976, which immediately repealed the old law as to all states except Alaska.

ASSURING MARKETABILITY OF TITLE

Casual reflection on the nature of title to real property and its use and transfer must lead to the conclusion that establishing marketable title is often a complex and difficult undertaking. The term itself has no universally accepted meaning. It does not mean a perfect title, but rather one which is free from plausible or reasonable objections. In effect, the title is marketable (or merchantable) if there is reasonable assurance as to the extent of the rights involved. The title must be such that a proper court would compel the buyer to accept it, if asked to decree specific performance of the sale contract.

Establishing a marketable title is especially important whenever land is transferred for consideration, and when, in connection with such transfer or otherwise, money is loaned with land as security. The prospective buyer or lender would be reluctant to commit funds to the transaction without some assurance of getting what was bargained for. Buyers of real property expect some assurance that there are no hidden interests in the real property they propose to buy.

For example: One uses the surface, another extracts subsurface minerals, and a third controls the air space above the surface; since much land is of comparatively high value, especially in urban areas where the growth and concentration of population have placed a premium on parcels of land and consequently the land has been divided and subdivided and recombined into a patchwork measured in feet and sometimes even in inches; since the persons who own or deal with land are themselves subject to a variety of laws which determine the extent of their rights (e.g., probate, dissolution, guardianship, bankruptcy, business association laws); and since creditors and others may burden the real property with a variety of encumbrances.

Who owns what? Essentially, then, the problem is one of determining all the important facts with reference to who owns what interests or rights in the title to a particular parcel of land. Actual possession of the property has always been important and helpful in providing the answer. But possession may be by someone other than the owner, and transfers may be made without taking possession. Hence, the documentary record of ownership in the county recorder's office of the county in which the parcel is located assumes great significance. Reliance on recorded documents is encouraged by the official

recording system under which deeds and other instruments affecting title may be recorded with the recorder of the county in which the land is situated. Thus a "chain of paper title" could be traced back to the original conveyance from the government. However, recordation is not compulsory, nor is it always properly done. Records may be erroneous, or sometimes may even reflect fraudulent and unenforceable transactions. When done thoroughly and conscientiously, the resulting records over the years become a complicated history in themselves, yet they may be woefully incomplete for purposes of determining the status of the title in question. This is so for a variety of reasons.

For example: In an intestate transfer, a qualified heir might have inadvertently been excluded; or a transfer, valid on its face may have been made by a person incompetent because of age or mental condition. Then too, other official records (e.g., tax records and records of court judgments) may profoundly affect the picture. In short, title to land and marketability of that title depend not only on recorded facts of title transfer, but also on a vast array of extraneous information outside of the documents recorded in the county recorder's office.

Abstract of Title

As might be expected under such complex circumstances, historically the individual buyer or lender was ill-equipped to make the necessary *investigation* of the status of the title to property. They soon came to rely on the title specialist who made a business of studying the records and preparing summaries or abstracts of title of all pertinent documents discovered in the search. An abstract of title is a summary statement of the successive conveyances and other facts (appearing in the proper place in the public records) on which a person's title to real property rests. The abstract of title and a lawyer's opinion of the documents appearing in the abstractor's "chain of title" were the basis of our earliest attempts to establish marketable title. This method still exists today, with modern refinements.

Certificate of Title

In time, abstractors accumulated extensive files of abstracts and other useful data, including "lot books" wherein references to recorded documents were systematically arranged according to the particular property affected, and "general indices" wherein landowners were listed alphabetically together with information concerning them and affecting titles (e.g., probates and property settlements).

These files came to be known as "title plants" and provided classified and summarized histories of real estate transactions and of other activities which affect or might affect ownership of the land in the areas covered. With the growth and improvement of title plants and increased proficiency of examiners employed by the abstractors, the formal abstract of title for delivery to the customer and the related legal opinion were sometimes dispensed with completely. The abstract company would simply study its records and furnish the customer with a certificate of title in which it stated that it found the title properly vested in the present owner, subject to noted encumbrances. The certificate plan has strictly limited use today, for it was a transitional method of assuring titles.

Guarantee of Title

The next step was the guarantee of title under which the title insurance company did more than certify the correctness of its research and examination.

Thus, the company provided written *assurances* (not insurance) about the title to real property. The coverage was usually limited to a particular condition of title, a certain

period of time, and a certain kind of information. This meant it was engaged in the insurance business and generally was subject to regulation as such.

Title Insurance

As already noted, the public records may be incomplete or erroneous and do not necessarily disclose shortcomings arising from forgery, incompetence, and failures to comply with legal requirements. Accordingly, the policy of title insurance was developed as the culmination of the quest for a reliable and marketable title as well as compensation for incorrect assurances which cause a covered loss. Although still covering most risks which are a matter of public record, it alone extends protection against many nonrecorded types of risks, depending on the type of policy purchased. The title insurance company continues to utilize the title plant to conduct as accurate a search of the records as possible and seeks to interpret correctly what it finds in the records. But its unique contribution is the protection it affords against risks which lie outside the public records.

Standard policy. In addition to risks of record, the standard policy of title insurance protects against:

- off-record hazards such as forgery, impersonation, or lack of capacity of a party to any transaction involving title to the land (e.g., a deed of an incompetent or an agent whose authority has terminated, or of a corporation whose charter has expired);
- the possibility that a deed of record was not in fact delivered with intent to convey title;
- the loss which might arise from the lien of federal estate taxes, which is effective without notice upon death; and
- the expense, including attorneys' fees, incurred in defending the title, whether the plaintiff prevails or not.

The standard policy of title insurance does *not* however protect the policyholder against defects in the title known to the holder to exist at the date of the policy and not previously disclosed to the insurance company; nor against easements and liens which are not shown by the public records; nor against rights or claims of persons in physical possession of the land, yet which are not shown by the public records (since the insurer normally does not inspect the property); nor against rights or claims not shown by public records, yet which could be ascertained by physical inspection of the land, or by appropriate inquiry of persons on the land, or by a correct survey; nor against mining claims, reservations in patents, or water rights; nor against zoning ordinances.

These limitations are not as dangerous as they might appear to be. To a considerable degree they can be eliminated by careful inspection by the purchaser or his or her agent (lenders) of the land involved, and routine inquiry as to the status of persons in possession. However, if desired, most of these risks can be covered by special endorsement or use of extended coverage policies at added premium cost.

ALTA Policy (for lenders). In California, many loans secured by real property have been made by out-of-state insurance companies which were not in a position to make personal inspection of the properties involved except at disproportionate expense. For them and other nonresident lenders, the special ALTA (American Land Title Association) Policy was developed. This policy expands the risks normally insured against to include: rights of parties in physical possession, including tenants and buyers under unrecorded instruments; reservations in patents; and, most importantly, unmarketable title. The new ALTA Loan Policy (10-17-92) also covers recorded notices of enforcement of excluded

matters (like zoning), as well as recorded notices of defects, liens, or encumbrances affecting title that result from a violation of matters excluded from policy coverage.

Extended coverage. The American Land Title Association has adopted an owner's extended coverage policy (designated as ALTA Owner's Policy [10-17-92]) that provides to buyers or owners the same protection that the ALTA policy gives lenders. But note that even in these policies no protection is afforded against defects or other matters concerning the title which are known to the insured to exist at the date of the policy yet have not previously been communicated in writing to the insurer, nor against governmental regulations concerning occupancy and use. The former limitation is self-explanatory; the latter exists because zoning regulations concern the condition of the land rather than the condition of title.

For homeowner's (1 to 4 residential units) a new CLTA/ALTA policy was developed in 1998; (ALTA Homeowner's Policy (10-17-98), and CLTA Homeowners Policy (6-2-98). The two policies are identical with one exception: the CLTA policy provides a form of Subdivision Map coverage, while the ALTA policy makes the Map Act coverage optional. The idea of the new policies is to provide homeowners with a form of extended coverage. The new policies contain for the first time, maximums payable under certain categories of coverages and small deductibles payable by the insured. Both policies incorporate protection against certain risks that conventionally were available only to lenders and only by endorsement.

Domestic Title Insurance Companies in California

Section 12359 of the Insurance Code of California requires that a title insurance company organized under the laws of this State have at least $500,000 paid-in capital represented by shares of stock. Section 12350 requires that the insurer deposit with the Insurance Commissioner a "guarantee fund" of $100,000 in cash or approved securities to secure protection for title insurance policy holders. A title insurer must also set apart annually, as a title insurance surplus fund, a sum equal to 10 percent of its premiums collected during the year until this fund equals the lesser of 25 percent of the paid-in capital of the company or $1,000,000. This fund acts as further security to the holders and beneficiaries of policies of title insurance.

Policies of title insurance are now almost universally used in California, largely in the standardized forms prepared by the California Land Title Association, the trade organization of the title companies in this State. Every title insurer must adopt and make available to the public a schedule of fees and charges for title policies. Today, it is the general practice in California for buyers, sellers and lenders, as well as the attorneys and real estate brokers who serve them, to rely on title insurance companies for title information, title reports and policies of title insurance.

Rebate Law

Title insurance companies are required to charge for preliminary reports under the terms of legislation adopted at the 1967 general session of the California Legislature. The rebate law requires title insurance companies to not only charge for reports, but also to make sincere efforts to collect for them except in certain defined circumstances.

Title insurance companies can still furnish "the name of the owner of record and the record description of any parcel or real property" without charge.

The statute extends the anti-commission provisions of Section 12404 of the Insurance Code to prohibit direct or indirect payments by a title insurance company to principals in a transaction as a consideration for title business.

Thus, the law prohibits a title insurance company from paying, either directly or indirectly, any commission, rebate or other consideration as an inducement for or as compensation on any title insurance business, escrow or other title business in connection with which a title policy is issued.

Torrens System of Land Registration

The Torrens system of land title registration, patterned after the system of registering titles to ships, was adopted by California in 1914 as the Land Title Act and provided for registration after a court decree in an action similar to a quiet title suit.

Always optional, the system never became popular and its use was confined almost exclusively to the southern counties. In 1955, the Torrens Act was repealed. All Torrens instruments were incorporated into the records of the county recorders, with the result that Torrens papers were included in the record chain of title and imparted constructive notice of their contents.

However, the repealing act provided that the records of the county recorder, after April 30, 1955 (thus including former Torrens registrations) would not have any greater or other effect as constructive notice or otherwise than they would have had prior to April 30, 1955. Because of this provision, a Torrens title which was defective because a documentary evidence of title had been recorded rather than registered was not cured by the repeal of the Act. For this reason, rules of practice governing the issuance of evidences of title to property once registered under the Torrens system cannot be ignored. As examples:

- If a deed to registered land was recorded instead of registered prior to April 30, 1955, the title would be unmarketable both before and after the repeal of the Act; and
- A recorded but unregistered deed of trust would not be a lien upon registered land prior to April 30, 1955 and the passage of the Act would not serve to elevate it to a status constituting constructive notice.

In both of the above examples, the defects in the title could be cured by re-recording the document after April 30, 1955. Title to real property formerly in the Torrens system that is not burdened with the defect just mentioned may be conveyed by grant deed. The grant deed may be recorded in the conventional way.